Supreme Court, U. S.
FILED
FEB 26 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

January Term, 1979
No. 78-1318

HELEN B. O'BANNON, Secretary of Public Welfare,
Petitioner

v.

TOWN COURT NURSING CENTER, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NORMAN J. WATKINS
Deputy Attorney General
Chief, Civil Litigation
EDWARD G. BIESTER, JR.
Attorney General

Department of Justice
Capitol Annex Building
Harrisburg, PA 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

	Page
I. Opinions Below	1
II. Jurisdiction	1
III. Question Presented	2
IV. Statement of the Case	3
V. Reasons for Granting the Writ:	
A. There is division among the Circuits	7
B. The decision of the lower Court is erroneous	11
Conclusion	14
APPENDIX:	
Complaint	1a
Motions for Temporary Restraining Order and Preliminary Injunction	8a
Order Dated July 21, 1977	15a
Defendant's Motion To Dismiss	17a
Motion To Dismiss	19a
Plaintiffs' Motion for Extension and Renewal of Preliminary Injunction	20a
Order Dated September 15, 1977	23a
Opinion	24a
Dissenting Opinion	60a
Order Amending Opinion	66a
Order Dated December 18, 1978	68a
Order Dated January 25, 1979	69a

TABLE OF CITATIONS

CASES:

Case v. Weinberger, 523 F.2d 602 (2d Cir. 1975) 4, 5

Caton Ridge Nursing Home v. Califano, 447 F. Supp. 1222 (D. Md. 1978) 11

Cook v. Bates, No. 78 Civ. 3600 (S.D. N.Y., Oct. 6, 1978), Medicare and Medicaid (CCH) ¶29,410 10

Klein v. Califano, 586 F.2d 250 (3d Cir. 1978) 6, 11

Moore v. Johnson, 582 F.2d 1228 (9th Cir. 1978) 7, 8, 9

Skehan v. Board of Trustees, Nos. 77-2311/12, slip op. at 22 (3d Cir., Dec. 21, 1978) .. 14

Town Court v. Beal, 586 F.2d 282 (3d Cir. 1978) 4, 5, 6, 9 10, 11,13

Town Court v. Beal, 586 F.2d 266 (3d Cir. 1978) 5

STATUTORY PROVISIONS:

38 U.S.C.A.:

§620 9
§620(b) 8
§642(a) 8

42 U.S.C.A.:

§1395 et seq. 3,9
§1395(a) 9
§1395f(a) 12
§1395x(j) 8

42 U.S.C.A.:

§1396 et seq. 3, 9
§1396(a) (23) 9, 11
§1396a(a) (28) 12
§1396i(a) (2) 8

ADMINISTRATIVE REGULATIONS:

42 C.F.R. §449 .....12, 13

45 C.F.R. §205.10(a) (5) 12, 13

CONSTITUTIONAL PROVISIONS:

United States Constitution:

Fifth Amendment 7
Fourteenth Amendment 5

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Helen B. O'Bannon, Secretary of Public Welfare for the Commonwealth of Pennsylvania, petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on September 29, 1978.

I. OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 586 F.2d 280 and are set out in the appendix at 24a, 60a. The District Court's order is set out at 23a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1978. Petitioners were granted successive requests for enlargement of time within which to prepare and file this petition to and including February 26, 1979, 68a, 69a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

III. QUESTION PRESENTED

This petition raises the question of whether or not patients of a particular nursing home have a property interest in the determination by the Secretary of Public Welfare that the home was unqualified to participate in Pennsylvania's Medical Assistance Program. A divided Court of Appeals *en banc* decided that federal law has created such an interest and therefore concluded that before a nursing home provider may be terminated as a provider of services under Title XVIII and XIX of the Social Security Act the residents of that facility must be provided some form of hearing. Thus, the following question is presented:

Whether the Due Process Clause requires that individuals who reside in a nursing home and receive services pursuant to Title XIX of the Social Security Act must be given notice and an opportunity for a hearing before that nursing home may be terminated as a qualified provider of services under that Act.

IV. STATEMENT OF THE CASE

On January 1, 1967, Respondent Town Court Nursing Home was certified as an eligible provider of skilled nursing home services under both Title XVIII (Medicare) and XIX (Medicaid) of the Social Security Act.[1] In 1974 substantial deficiencies were noted in the annual surveys of the Town Court facility. A subsequent series of state and federal surveys and administrative proceedings culminated in the decertification of the facility as a Medicare provider by the Secretary of Health, Education and Welfare, effective June 18, 1977. Similarly, and based entirely upon this federal action, the Petitioner notified Town Court that its participation in the Medicaid Program would terminate on that same date.[2] Town

[1] 42 U.S.C. §1395 *et. seq.* (Medicare) and 42 U.S.C. §1396 *et. seq.* (Medicaid). Generally see the Social Security Amendments of 1972, Pub. L. No. 92-603, §246, 249A; 86 Stat. 1329 which provides for a uniform system of certification of facilities under Medicare and Medicaid. That Act provides that the actual survey of the facility is to be conducted, at least in the first instance, by the state's health agency. In Pennsylvania that function is performed by the Department of Health.

[2] Although the administration of the Title XIX programs have largely been left to the states, the 1972 amendments to the Social Security Act have consolidated the ultimate authority for approving a nursing home as a provider of services with the Secretary of HEW. Nevertheless, a provider such as Town Court, that participates in both programs, must receive its threshold approval as a Title XIX provider

Court then commenced administrative proceedings within HEW. After the submission of documentation in support of Town Court's request for reconsideration, the initial termination decision was affirmed.[3]

Instead of pursuing administrative remedies, the Respondent initiated these proceedings in the Eastern District of Pennsylvania on July 20, 1977. Town Court, on its own behalf sought to enjoin its termination as an eligible participant in both the Medicare and Medicaid Programs. The thrust of the complaint was that it violated procedural due process to terminate Town Court's eligibility without first providing it a full evidentiary hearing administratively and the right to seek judicial review. The District Court disagreed and refused to grant Town Court the injunctive relief that it had sought. On appeal[4] the Court of Appeals for the Third Circut affirmed the District Court in this respect, concluding that:

> in light of the extensive procedural safeguards already provided to facilities such as Town Court we believe it clear that any interest Town Court might have in continued certification under the Medicare program[5] is adequately protected by existing procedures.

Town Court v. Beal, 586 F.2d 266, 278 (3d Cir. 1978).

Although that determination was correct[6] and has not been challenged, six residents of Town Court had also joined in its complaint, contending that Town Court's termination unconstitutionally violated *their* right to the procedural safeguards of the Fourteenth Amendment.[7] Specifically, they argued that they were entitled to a hearing before it was determined that the Town Court facility was not eligible to participate in the Medicare and Medicaid programs. They contended that they would suffer a "de facto" loss of Medicaid benefits and therefore a substantial property interest without a prior hearing. 28a; *Town Court v. Beal, supra* at 285. In a separate opinion vacating the district court order denying their request for injunctive relief, the Court of Appeals held that:

> '[b]ecause a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare, Med-

from the state. That certification must, however, be terminated if the Secretary of HEW determines that such a program is not eligible to participate in Title XVIII as a Medicare provider. See *Case v. Weinberger,* 523 F.2d 602, 609-10 (2d Cir. 1975). This is, of course, precisely what happened in this case.

[3] 28a. *Town Court v. Beal,* 586 F.2d 282 (3d Cir. 1978).

[4] In fact the appeal was taken by Town Court from the District Court's refusal to extend its preliminary injunction (23a).

[5] As noted previously, Town Court was certified as an eligible provider under both Medicare and Medicaid and was challenging its termination of eligibility to participate in both programs. *Town Court v. Beal, supra* at 282.

[6] See e.g. *Case v. Weinberger,* 523 F.2d 602 (2d Cir. 1975).

[7] These patients attempted to sue on behalf of a class of similarly situated residents of skilled nursing home providers 27a That class was never certified but, the respondents are currently still receiving Medicaid benefits and in fact remain at the Town Court facility. 28a; *Town Court, supra* at 282.

icaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare.'

29a; *Town Court v. Beal, supra* at 282-3, quoting *Klein v. Califano,* 586 F.2d 250, 258 (3d Cir. 1978). The Court of Appeals, however, never prescribed the constitutional prerequisites of such a hearing—leaving that to the District Court on remand. 29a; *Town Court v. Beal, supra* at 283. However, this threshold finding of a property interest is erroneous and final, and because Petitioner presently does not provide the residents of these facilities *any* opportunity for a hearing, review of this decision is presently sought in this Court.

V. REASONS FOR GRANTING THE WRIT

A. There Is Division Among the Circuits

The decision of the Third Circuit in this case is in direct conflict with decisions in similar cases in another circuit and district courts. In *Moore v. Johnson,* 582 F.2d 1228 (9th Cir. 1978), the Administrator of the Veteran's Administration had determined that certain patients of veteran's administration hospitals were receiving care in facilities that did not meet the statutory requirements. Accordingly, these patients were notified that they would be relocated to alternative qualified facilities. *Moore v. Johnson, supra* at 1230. As in this case, the patients objected, claiming that the Administrator's action violated their rights to procedural due process under the Fifth Amendment.[8] Specifically, the residents claimed a constitutional right to a pre-relocation hearing and a declaration that any relocation without such a hearing violated the Fifth Amendment. *Id.* at 1232.

The District Court dismissed the complaint, and concluded that with respect to the due process claims, the residents had no property interest in continued domiciliary care at a particular Veteran's Administra-

[8] Although their complaint apparently raised various other contentions, both the District Court and the Court of Appeals felt constrained to resolve the case on the basis of their due process claim. *Moore v. Johnson, supra* at 1232.

tion facility. *Id.* at 1231. On appeal, a panel of the Court of Appeals for the Ninth Circuit unanimously concluded that the district court was correct. Specifically, the court concluded that:

> to the extent that they believed that the administrator *must* furnish domiciliary care and vocational training benefits *to them* at *specific facilities in Los Angeles* their expectations . . . are mere 'unilateral expectations'. As such, they are not property interests. (Emphasis in original.)

Id. at 1233-4.

The approach and result reached in *Moore* are in direct conflict with the decision below. Although *Moore* concerned veteran's programs and this case concerns medicare and medicaid programs, both involve the central question of whether or not the actual recipients of these health care benefits are constitutionally entitled to participate in the governmental decertification of providers of these services. In fact the programs in both cases are essentially the same: persons deemed eligible for the services are statutorily entitled to receive such services *only* in facilities which have been approved for that purpose, by the Secretary in the case of Medicare and Medicaid, or the Administrator in the case of veterans benefits.[9]

[9] Compare: 38 U.S.C.A. §620(b) and §642(a) (Veterans Administrator is authorized to inspect and approve or disapprove nursing homes for participation in the program); and 42 U.S.C.A. §1395x (j) (Secretary of HEW may prescribe the standards for participating in the Medicare and Medicaid as a skilled nursing home). See also 42 U.S.C.A. §1396i (a)(2) (certification by the Secretary under Title XVIII (§1395a *et seq.*) shall be deemed as certification of that facility to participate under Title XIX (§1396a *et seq.*)). Under Titles XVIII and XIX, eligible recipients are permitted to choose freely among facilities which have been deemed to qualify for participation in the program. 42 U.S.C.A. §§1395a and 1396a(a)(23). The patient's right to choose among qualified providers of Veteran's nursing home benefits is less clear. *E.g.*, 38 U.S.C.A. §620.

Similarly, when a facility no longer meets the standards established by their respective agencies for participation in the program, then funds may not be expended in that facility under either program.

In both *Moore* and *Town Court,* the responsible governmental agencies determined that the respective providers of residential care were no longer qualified to participate in the program. Similarly, in both cases the residents who were generally eligible for benefits under the programs and were receiving services in these particular facilities asserted a constitutional right to be heard on that determination.[10] In decisions spanned by a single day[11], the Ninth and

[10] In *Moore*, the plaintiffs sought to directly challenge the right of the Administrator to order their transfer to a qualified facility. In *Town Court*, the residents premised their right to participate in the decertification process on their contention that decertification of the facility would necessarily result in their transfer to another facility. However, in both cases they were directly seeking to intervene in the decertification decision making.

[11] *Moore* was decided on September 28, 1979 and *Town Court* was decided one day later, on September 29, 1979. Moreover, the district court's decision in *Moore* does not appear to have been reported; thus, it is understandable that the Third Circuit did not specifically address the reasoning advanced in *Moore*.

Third Circuits issued diametrically opposed rulings—the Ninth Circuit finding that no property interest of the patients was involved and the Third Circuit finding just the opposite.

In similar contrast to the Third Circuit's approach in *Town Court* is the decision rendered in *Caton Ridge Nu. ing Home v. Califano,* 447 F. Supp. 1222 (D. Md. 1978), appeal pending, No. 78-1290 (4th Cir. May 15, 1978). In *Caton Ridge,* the nursing home corporation and a former patient[12] of that nursing home sought to enjoin both the state and federal agencies from decertifying that facility as a medicaid provider of skilled nursing home services. Like the respondents in this case, the patient in *Caton Ridge* claimed a due process right to a hearing before the nursing home could be decertified. The district court correctly concluded, however, that "the termination of Caton Ridge's status and the subsequent transfer of [the plaintiff] on 30 days notice with no opportunity for a hearing did not infringe on her rights". *Cation Ridge, supra* at 1225. Similarly, in *Cook v. Bates,* No. 78 Civ. 3600 (S.D. N.Y., Oct. 6, 1978), reported in Medicare and Medicaid Guide (CCH) ¶29,410, the Court found that Medicaid patients had no due process right to contest the termination of payments to the facility at which they were receiving psychiatric services.

[12] The only named plaintiff, Ethel Grabill was not a resident of that facility when the action was commenced, having been transferred to a qualified facility as a result of the decertification of the Caton Ridge facility. 447 F. Supp. at 1224. Thus the question of mootness has been raised on appeal. Brief for Appellees, *Caton Ridge Nursing Home Inc. v. Joseph Califano,* No. 78-1290 at 7-8 (4th Cir. filed July 25, 1978. See also *Klein v. Califano,* 586 F.2d 250, 254-5 (3d Cir. 1978).

The Third Circuit has, in the companion to *Town Court,* attempted to distinguish *Caton Ridge* on the basis that the reasons for the decertification of the Caton Ridge Nursing Come were structural rather than deficiencies in services being rendered to the patients. *Klein v. Califano,* 586 F.2d 250, 260, at n. 17 (3d Cir. 1978). This, of course, misperceives the patient's statutory entitlements under Title XIX. Recipients have a legitimate interest in choosing among qualified providers, but they have not been given any role in the evaluation of facilities for purposes of continued participation in the program. Thus, it is largely irrelevant for due process purposes why a particular facility has been determined to be unqualified. Accordingly, there is a division among the Circuits over this important question and, therefore, review of this case is respectfully requested.

B. The Decision of the Lower Court Is Erroneous

The lower court predicated its ruling on its determination that federal law created a constitutionally cognizable property interest in the patients of Town Court in not having that facility decertified.[13] The Court of Appeals relied upon the freedom of choice provision of Title XIX,[14] and administrative regula-

[13] 29a; See *Klein v. Califano,* 586 F.2d 250, 257-259 (3d Cir. 1978).

[14] 42 U.S.C. §1396(a)(23).

tions requiring notice and hearing before a recipient's benefits may be terminated,[15] as well as those restricting the transfer of patients from one facility to another.[16]

However, the court misperceived the effect of these provisions. For example it overlooked the clear statutory mandate that Medicare and Medicaid services only be provided by *qualified* providers. Title XVIII specifically provides that "payment for services furnished an individual may be made only to providers of services which are eligible therefor. . .".[17] Similarly, Title XIX requires that in order for a skilled nursing home to qualify as a Title XIX provider it must satisfy all of the requirements of Title XVIII.[18] This determination of whether or not a provider of services is eligible under this program has been vested by Congress with the Secretary of

[15] 45 C.F.R. §205.10(a)(5) provides:

> an opportunity for a hearing shall be granted to any applicant who requests a hearing because his claim for financial or medical assistance is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance or termination of assistance. A hearing need not be granted when either State or Federal law require automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation.

[16] 42 C.F.R. §449 provides that a patient may be "transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay (except as prohibited by the Title XIX program)".

[17] 42 U.S.C. §1395f(a).

[18] 42 U.S.C. §1396a(a)(28).

H.E.W. and the States. Therefore a patient's statutory right to choose among providers is explicitly limited to choosing among qualified providers.

Similarly, the regulatory restrictions on the transfer of patients do not restrict the Secretary's authority under the Act to determine whether or not a particular skilled nursing home is qualified to participate in the program. These transfer provisions only impose a standard of conduct upon nursing home operators. Thus, a patient who has chosen to receive services from a particular *qualified* nursing home may not be transferred by that nursing home provider without cause. 42 C.F.R. §449. Accordingly, this provision has no application in the determination of whether or not a particular nursing home meets the statutory requirements to participate in the program.

Finally, 45 C.F.R. §205.10(a)(5) provides no substantive entitlements to recipients of Medicaid. These procedural requirements of notice and hearing only apply when a recipient's benefits under Medicaid are threatened with termination or diminution. The decision to decertify a particular *provider* of services does not affect the recipient's eligibility for those services. It only requires, as is always the case, that a recipient receive those services from a provider that is qualified to participate in the program. As the dissent in this case recognized, the majority's decision implies that ultimately recipients may have the right under Title XVIII and XIX to continue to receive care in an unqualified home.[19] Accordingly,

[19] 62a; *Town Court*, *supra* at 296. Termination of an existing provider agreement is only one of several ways in which patients might be required to receive care from a dif-

the decision of the lower court by perceiving a property interest where none exists must be reviewed by this Court at this juncture in the litigation.[20]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment in the Court of Appeals for the Third Circuit in this case.

NORMAN J. WATKINS
Deputy Attorney General
Chief, Civil Litigation
EDWARD G. BIESTER, JR.
Attorney General

ferent nursing home. For example, the provider could voluntarily terminate its business, declining to participate in the Title XVIII and XIX programs. The court's opinion would seemingly require hearings in these cases. In fact the reasoning in this case will necessarily be applied to the termination of any provider of governmental benefits to the public.

[20] It is true that the Court of Appeals has remanded the matter to the District Court for further proceedings. However, its decision with respect to the threshold due process question is final and therefore, if an error has been committed in this regard it can only be resolved in this Court. In addition, the interests of judicial economy argue forcefully for review at this time. Indeed, the lower court in a similar due process case has noted the finality of rulings such as are involved here. *Skehan v. Board of Trustees*, Nos. 77-2311/12, slip op. at 22 (3d Cir., Dec. 21, 1978).

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474
Class Action

TOWN COURT NURSING CENTER, INC.
and
EMMA COOPER
and
MARY CRAWFORD
and
HAZEL KEMP
and
ARNOLD L. PHILLIPS
and
DELPHINE TADDEI
and
NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Plaintiffs,

v.

FRANK S. BEAL, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,
and
JOSEPH A. CALIFANO, JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare,

Defendants.

VERIFIED COMPLAINT

1. Plaintiff Town Court Nursing Center, Inc. (hereinafter referred to as "Town Court") is a corporation organized under the laws of the Commonwealth of Pennsylvania with its offices at 1526 Lombard Street, Philadelphia, Pennsylvania, where it operates Town Court Nursing Center, a skilled care facility.

2. Plaintiffs Emma Cooper, Mary Crawford, Hazel Kemp, Arnold L. Phillips, Delphine Taddei and Nancy Truitt are individuals who have been patients at and residents of Town Court Nursing Center since at least February 28, 1977 and who are qualified as medically indigent under the Pennsylvania Medical Assistance Program, 62 P.S. §441.1 *et seq.* (more commonly known as "Medicaid").

3. Defendant Frank S. Beal is Secretary of Public Welfare of the Commonwealth of Pennsylvania. He is sued both in his individual and his official capacities.

4. Defendant Joseph A. Califano, Jr. is Secretary of the United States Department of Health, Education and Welfare. He is sued both in his individual and his official capacities.

5. Jurisdiction is founded upon 28 U.S.C. §§1331-(a) and 1361. The amount in controversy exceeds $10,000, exclusive of interest and costs.

COUNT I
(Town Court v. Beal)

6. On or about May 20, 1977 defendant Beal, through his deputy, Glenn Johnson, Director, Bureau of Medical Assistance, Department of Public Welfare, notified Town Court that, effective June 18, 1977, it would "no longer receive payments under the Medical Assistance Program for skilled nursing care or for services provided to Medical Assistance patients."

7. Therefore, effective June 18, 1977, defendant Beal terminated the Skilled Nursing Home Care Agreement entered into by and between the Pennsylvania Department of Public Welfare and Town Court on September 4, 1975 as extended.

8. Pursuant to Federal regulation, Town Court continued to be eligible to receive Medicaid payments until July 18, 1977 when, despite denial of all charges and written appeal and a demand for a hearing, eligibility for such payments ceased.

9. The aforesaid action by defendant Beal violates Town Court's constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

10. Approximately 180 of the 198 patients at Town Court are qualified under the Medicaid program which program pays their charges for use of the facilities at Town Court.

11. In the absence of reimbursement for the services provided these patients, Town Court will be unable to maintain operations and will be forced to

close to avert an overwhelming and irreparable financial loss to its owner, Geriatric and Medical Services, Inc., a public company.

12. There is no adequate remedy at law.

COUNT II

(Emma Cooper, et al. v. Beal)

13. Paragraphs 1 through 8, inclusive, and 11 and 12 above, are incorporated by reference as though set forth herein in full.

14. The individual plaintiffs are in chronic need of the services provided by Town Court which services are not presently available at other skilled care facilities in Philadelphia.

15. The following sets forth the most recent date of admission to Town Court for each of the named individual plaintiffs:

Emma Cooper—July 16, 1976

Mary Crawford—September 23, 1975

Hazel Kemp—October 18, 1973

Arnold L. Phillips—October 18, 1973

Delphine Taddei—October 16, 1976

Nancy Truitt—February 28, 1977

CLASS ACTION ALLEGATIONS

16. The individual plaintiffs are six of the one hundred eighty patients at Town Court eligible to receive Medical Assistance program benefits.

17. Each of these patients will suffer and is suffering a loss of benefits of the aforesaid program

without the benefit of a hearing under 45 C.F.R. §205.10 and in violation of their constitutional rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

18. This action is designated a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure.

19. If Town Court is compelled to close or otherwise cease providing skilled care services to the members of the plaintiff class, they will suffer immediate and irreparable psychological and physical harm.

COUNT III

(Town Court v. Califano)

20. Paragraphs 1 through 8, inclusive, and 11 and 12 above, are incorporated by reference as though set forth in full herein.

21. By letter dated May 17, 1977, defendant Califano, by his agent, Mr. Robert J. Taylor, Director of Long Term Care, Standards Enforcement, Department of Health, Education and Welfare, notified Town Court that, effective June 18, 1977, its certification as a skilled care facility provider under the Medicare program, pursuant to an agreement dated July 19, 1976, was terminated.

22. In conformity with Federal regulations, Town Court thereupon requested a reconsideration which reconsideration was denied by defendant Califano by his failure to respond to that request as of July 18,

23. Although Town Court has denied all charges and has requested but not yet received a hearing on the merits, defendant Califano has nevertheless ter-

minated Town Court's participation in the Medicare program.

24. The aforesaid action by defendant Califano violates Town Court's constitutional right to due process under the Fifth Amendment to the United States Constitution.

WHEREFORE, plaintiffs request that this Honorable Court enter the following preliminary and permanent relief against the defendants herein:

1. Enjoin defendants Beal and Califano, their agents, attorneys, deputies, employees and successors from, prior to a final determination of all appeals by Town Court Nursing Center, Inc. from the termination of its Medicare and Medicaid certifications:

a. terminating the Medicare and Medicaid certifications of plaintiff Town Court Nursing Center, Inc.;

b. removing patients who are eligible for Medicare and Medicaid from Town Court Nursing Center, Inc.'s skilled care facility at 1526 Lombard Street, Philadelphia, Pennsylvania;

c. discontinuing or withholding payments to plaintiff Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficiaries;

d. prohibiting placement of other Medicare and Medicaid patients with plaintiff Town Court Nursing Center, Inc.;

2. Awarding plaintiff Town Court Nursing Center, Inc. the amount, with interest, of any payments heretofore withheld by either of the

defendants on account of their respective decertifications; and

3. Awarding plaintiffs their attorneys fees and costs.

(s) Jeffrey A. Albert
(s) Jeffrey Albert
Jeffrey B. Albert
1401 Walnut Street, 10th Floor
Philadelphia, PA 19102
(215) LO8-5700

Of Counsel:
Fox, Rothschild, O'Brien & Frankel

Commonwealth of Pennsylvania
County of Philadelphia, ss:

DANIEL VELORIC, being duly sworn according to law, deposes and says that he is the president of the plaintiff in the within action, that he is authorized to and does take this affidavit on behalf of the plaintiffs in this action and that the averments contained in the within complaint are true and correct to the best of his knowledge, information and belief.

(s) Daniel Veloric
Daniel Veloric

Sworn to and Subscribed Before me this 19th day of July, 1977.

(Illegible)
Notary Public

Notary Public, Phila, Philadelphia Co.
My Commission Expires December 16, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare,

and

FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs, Town Court Nursing Center, Inc., et al., by their attorneys, Nathan L. Posner and Jeffrey B. Albert, Esquires, move this Honorable Court for a temporary restraining order in the form attached hereto restraining defendants as set forth therein pending hearing and determination of plaintiffs' motion for a preliminary injunction, on the ground that immediate and irreparable injury, loss and damage will result to plaintiffs before such hearing can be held and that notice of the filing of this motion has been given as

set forth in the affidavit attached hereto, and plaintiffs further move this Honorable Court for a preliminary injunction granting all preliminary relief prayed for in the Complaint filed in this action.

(s) Jeffrey Albert
Nathan L. Posner
(s) Jeffrey Albert
Attorneys for Plaintiffs

Of Counsel:

Fox, Rothschild, O'Brien & Frankel

Commonwealth of Pennsylvania
County of Philadelphia, ss:

I, Maurice E. Linden, being duly sworn, do hereby state and aver as follows:

1. I am a practicing physician duly licensed in the Commonwealth of Pennsylvania. I maintain offices at 7100 Germantown Avenue, in the City of Philadelphia.

2. I am familiar with Town Court Nursing Center, 1526 Lombard Street, Philadelphia, Pennsylvania and the type of patients who reside there.

3. Town Court is a skilled care facility which has a substantial number of elderly and chronically ill patients.

4. Transfer from such a facility may cause these patients to suffer substantial psychological and physical harm and, in certain circumstances, could increase the possibility of serious illness and even death.

5. Unless an individual patient is clearly shown to be able to withstand the trauma of being moved to another facility, I would not favor such a transfer from Town Court.

Maurice E. Linden M.D.

Sworn to and Subscribed before me this 19th day of July, 1977.

(Illegible)
Notary Public

Notary Public, Phila., Philadelphia Co.
My Commission Expires December 16, 1980

Commonwealth of Pennsylvania
County of Philadelphia, ss:

AFFIDAVIT OF DANIEL VELORIC

I, DANIEL VELORIC, being duly sworn, do hereby state and aver as follows:

1. I am the president of Town Court Nursing Center, Inc. which operates a 198-bed skilled nursing facility, at 1526 Lombard Street, Philadelphia, Pennsylvania.

2. Among the patients presently occupying beds at Town Court approximately 180 have been determined to be eligible under Pennsylvania's Medical Assistance Program (commonly known as Medicaid), i.e. indigent persons as defined by 62 P.S. §441.1 *et seq.*

3. As a provider of nursing home services to these patients, Town Court may be reimbursed for its services to these patients by the Commonwealth of Pennsylvania if and only if Town Court is certified for participation in the Medicaid program. 62 P.S. §443.1 (3).

4. That certification is obtained pursuant to an agreement entered into between the Commonwealth and Town Court with respect to Town Court's status as a provider.

5. On September 4, 1975 such an agreement was entered into between the Commonwealth and Town Court.

6. By letter dated May 17, 1977 Mr. Robert Taylor, Director, Office of Long Term Care, Standards Enforcement, United States Department of Health, Education and Welfare, terminated Town Court's certification as a provider under the *Medicare* program by failing to renew the then existing provider agreement dated July 19, 1976 between Town Court and the United States Department of Health, Education and Welfare with respect to that program.

7. By letter dated May 20, 1977 Mr. Glenn Johnson, Director, Bureau of Medical Assistance, Department of Public Welfare, Commonwealth of Pennsylvania, terminated Town Court's participation in the Medicaid program "due solely to the fact that HEW has notified us of your Title XVIII termination".

8. No means of review of the determination is provided by the Commonwealth of Pennsylvania as to the merits of the termination, the review being limited to whether "HEW has not decided to terminate your

facility from participation in the Medicare program. . . ."

9. No means of review of the termination, by the Federal Government is provided as to the merits *prior to termination* except that Town Court did file a request for reconsideration which request has been ignored.

10. As a result of the aforesaid terminations of Town Court from participation both under the Medicare and Medicaid programs, Town Court is no longer receiving, as of July 19, 1977 an financial reimbursement from any source for the provision of nursing home and related services to any of the individual patients and its other patients, present and prospective, who are or will be entitled to benefits under either of these programs.

11. Town Court will, if no immediate relief is granted it in the instant litigation and insofar as beds are available elsewhere, begin removing plaintiffs from Town Court to other facilities certified for participation in these programs.

12. However, at present there are no known available beds in such facilities and, in fact, there is a tremendous shortage of such beds in the Philadelphia area.

13. Further, Town Court is the largest skilled nursing and intermediate care facility in Philadelphia. It is constantly being asked by local hospitals and other institutions to admit additional Medicare and Medicaid patients for which Town Court has no room.

14. Therefore, unless immediate relief is granted, Town Court is to be left with the unenviable alternative of treating patients for no compensation whatsoever, or literally dumping these ill elderly on the sidewalks of Lombard Street.

15. Further, even were beds available elsewhere, these patients are likely to suffer what has been described as transfer trauma:

> "The damage which may result from such transfers is irreparable in the true sense of the word. Changes in surroundings and movement of long distances of senior citizens who are suffering from physical and psychological infirmities are likely to aggravate their condition and increase the likelihood of death."

Burchette v. Dumpson, 387 F. Supp. 812, 819 (E.D. N.Y. 1974). See also HEW Technical Assistance Memorandum A.A-TA-75-1 (Feb. 19, 1975).

> "There is a genuine hazard in the relocation of infirm aging persons from one facility to another. Dramatic increases in mortality far in excess of what would normally be expected have been documented."

Quoted in *Klein v. Mathews,* 430 F. Supp. 1005 (D. N.J. 1977), and *Hathaway v. Mathews,* 546 F.2d 227, 231 (7th Cir. 1976).

16. But for the Federal and State termination of Town Court, Town Court would have continued to be and desires to continue as a provider under both the Medicare and Medicaid programs.

(s) Daniel Veloric Pres.
Daniel Veloric

Sworn to and Subscribed before me this 19th day of July, 1977.

(s) Francis M. Killian
Notory Public

Notory Public, Phila., Philadelphia Co.

My Commission Expires December 16, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TOWN COURT NURSING CENTER, INC., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare,
and
FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

ORDER

AND NOW, this 21st day of July, 1977, upon consideration of the Verified Complaint, the affidavits submitted therewith, plaintiffs' memorandum of law, the affidavit of plaintiffs' counsel as to the giving of notice to counsel for the defendants herein, and plaintiffs' motions for temporary restraining order and preliminary injunction,

IT IS HEREBY ORDERED AND DECREED that, pursuant to Rule 65 of the Federal Rules of Civil Procedure, the defendants, Frank S. Beal and Joseph A. Califano, Jr., each of them, their agents, attorneys, deputies, employees and successors, shall be enjoined and restrained until 2:00 P.M., Tuesday, July 26, 1977, from:

a. discontinuing or withholding payments to plaintiff Town Court Nursing Center, Inc. for the care of Medicare and Medicaid beneficiaries.

Plaintiffs shall file with this Court security in form satisfactory to the Clerk of the Court in the amount of $100.00.

IT IS FURTHER ORDERED that plaintiffs' motion for preliminary injunction shall be heard by this Court on the day of Tuesday, July 26, 1977 at 2:00 P.M. in Courtroom at the United States Courthouse, 6th & Market Streets, Philadelphia, Pennsylvania.

IT IS FURTHER ORDERED that a true copy of this Order together with the Summons, Complaint, Affidavits and Memorandum of Law be served within three (3) days of the date hereof upon each of the Defendants. Service and the return of service may be made by any competent persons eighteen (18) years of age or older.

(s) John P. Fullam
United States District Juge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, Inc., et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare

and

FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

DEFENDANT'S MOTION TO DISMISS

The defendant Secretary Frank S. Beal, by his attorney, M. Faith Angell, Deputy Attorney General for Eastern Pennsylvania, reserving the right to file an answer on the merits if the same is required, hereby moves the Court to dismiss plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b) for the following reasons:

1. The Complaint fails to state a claim against Defendant Beal upon which relief can be granted.

2. The Court lacks subject matter jurisdiction.

3. The absence of a pre-termination hearing fails to rise to a due process constitutional violation.

This Motion is based on the accompanying Memorandum of Law.

Respectfully submitted,
(s) M. Faith Angell
Deputy Attorney General
Michael von Moschzisker
Deputy Attorney General
Eastern Regional Director
Robert P. Kane
Attorney General

206 State Office Building
Philadelphia, Pa. 19130
Telephone: (215) 238-6661

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC. et al.
Plaintiffs

v.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education & Welfare,
and
FRANK S. BEAL, Secretary of Public Welfare, Commonwealth of Pennsylvania,
Defendants

MOTION TO DISMISS

Defendant, JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, moves this Honorable Court pursuant to Federal Rule of Civil Procedure 12 (b), to dismiss the complaint against him for the reason that this Court lacks jurisdiction over the subject matter, and that the plaintiffs have failed to establish entitlement to injunctive relief.

Respectfully submitted,
(s) David W. Marston
United States Attorney
(s) Robert N. de Luca
Assistant United States Attorney, Chief, Civil Division

Dated: 29 August 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 77-2474

TOWN COURT NURSING CENTER, INC. et al.
Plaintiffs

v.

JOSEPH CALIFANO, JR., Secretary of Health,
Education and Welfare

and

FRANK S. BEAL, Secretary of Public Welfare,
Commonwealth of Pennsylvania
Defendants

PLAINTIFFS' MOTION FOR EXTENSION AND RENEWAL OF PRELIMINARY INJUNCTION

---

1. On July 27, 1977 this Honorable Court issued an Order granting plaintiffs certain preliminary injunctive relief until such time as the United States Department of Health, Education and Welfare gave the parties five (5) days notice of its decision with respect to the request by plaintiff, Town Court Nursing Center, Inc., for reconsideration of HEW's decision to terminate Town Court's status as a Medicare provider.

2. On September 9, 1977, by hand delivery, Town Court, but neither its counsel nor counsel for the individual plaintiffs, received notice that HEW had denied Town Court's request for reconsideration on August 4, 1977, and that such decision would become effective on September 14, 1977.

3. Since the State inspection on June 24, 1977, there has been no Federal or State inspection of Town Court.

4. During the period prior to the reconsideration decision, as well as thereafter, to the best of plaintiffs' knowledge, information, and belief, no efforts have been made by defendants to gain knowledge of the then existing conditions at Town Court.

5. During the period prior to the reconsideration decision, as well as thereafter, Town Court has not been requested by either defendant to change or correct any condition then existing at Town Court.

6. Town Court continues to provide the excellent quality of care and physical environment testified to by plaintiffs' witnesses at the hearing held on July 26 and 27, 1977, which testimony is incorporated herein, by reference.

7. The parties-plaintiff will suffer immediate and irreparable harm if the preliminary injunctive relief granted them on July 27, 1977 is not continued until such time as Town Court's rights to participation in the Medicare and Medicaid programs are fully and finally adjudicated after hearing and judicial review, if necessary.

8. There is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request this Honorable Court to extend and renew the preliminary injunction issued on July 27, 1977 until such time as plaintiffs have exhausted their rights to seek review of defendants' efforts to terminate Town Court Nursing Center, Inc. as a Medicare and Medicaid provider.

(s) Nathan L. Posner
Nathan L. Posner
Jeffrey B. Albert
Attorneys for Town Court Nursing Center, Inc.

(s) William F. Coyle
William F. Coyle
Attorney for Emma Cooper et al.

Of Counsel:

Fox, Rothschild, O'Brien
& Frankel

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2474

Town Court Nursing Center, Inc., et al.

v.

Frank S. Beal, individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania, et al.

ORDER

AND NOW, this 15th day of September, 1977, upon consideration of plaintiffs' Motion for extending the duration of the preliminary injunction heretofore entered in this case, and after hearing thereon, it is ORDERED:

That plaintiffs' Motion is DENIED, and the preliminary injunction heretofore entered is DISSOLVED: provided, however, that the defendants shall not withhold payments for services actually provided to patients.

John R. Fullam,
J.

Filed September 15, 1977
9/16/77 Copy to USA
Entered: 9/16/77 Clerk of Court

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 77-2222 and 77-2444

TOWN COURT NURSING CENTER, INC.

AND

COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

AND

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education and Welfare

EMMA COOPER, MARY CRAWFORD, HAZEL KEMP, ARNOLD L. PHILLIPS, DELPHINE TADDEI and NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Appellants in No. 77-2222

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare,

Appellant in No. 77-2444

Appeal From the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 77-2474)

Argued January 4, 1978

Before: SEITZ, *Chief Judge*, GIBBONS and GARTH, *Circuit Judges*.

Resubmitted In Banc July 10, 1978

Before: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGENBOTHAM, *Circuit Judges*.

(Opinion filed September 29, 1978)

WILLIAM F. COYLE, ESQ.
1430 Land Title Building
Philadelphia, Pa. 19110
Attorney for Emma Cooper, et al., Appellants in No. 77-2222

MARIA PARISI VICKERS
Asst. Att. Gen.
MICHAEL VON MOSCHZISKER
Deputy Att. Gen.
Eastern Regional Director

ROBERT P. KANE
Attorney General
206 State Office Building
Philadelphia, Pa. 19130
Attorneys for Frank S. Beal, Appellee in No. 77-2222

DAVID W. MARSTON
United States Attorney
WALTER S. BATTY, JR.
Chief, Appellate Section

ROBERT N. DELUCA
Chief, Civil Division
3310 United States Courthouse
Philadelphia, Pa. 19106
Attorneys for Joseph A. Califano, Jr., Appellee in No. 77-2222 and Appellant in No. 77-2444

Of Counsel:
STEPHANIE W. NAIDOFF
Regional Attorney

MARGARET M. HATHAWAY
Assistant Regional Attorney
Department of Health, Education and Welfare
P. O. Box 13716
Philadelphia, Pa. 19106

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

ALDISERT, *Circuit Judge*, with whom Circuit Judges Gibbons, Weis, and Higgenbotham join.

Appellants in No. 77-2222, a proposed class action which was consolidated with *Town Court Nursing Center, Inc. v. Beal*, decided today, — F.2d — (3d Cir. 1978), are six residents at the Town Court Nursing Center who contend that their due process and statutory rights would be violated by termination of Medicaid funding to the nursing home without a pre-termination hearing. Because the district court made no class-action determinations, we treat this as the appeal of the named patients only. They have appealed from an order of the district court denying their motion to extend portions of a preliminary injunction entered during an earlier phase of the litigation.

They had requested a preliminary and permanent injunction to prevent the defendants, "prior to a final determination of all appeals by Town Court Nursing Center, Inc.," from (a) terminating Town Court's Medicare and Medicaid certification; (b) removing eligible patients from Town Court; (c) discontinuing or withholding reimbursement for the care of Medicare and Medicaid patients; and (d) prohibiting future placement of other Medicaid-eligible patients at Town Court.

The district court issued a temporary restraining order on July 21, 1977, enjoining the defendants

from discontinuing or withholding reimbursement for care provided to eligible patients, pending reconsideration by HEW of a preliminary decision to terminate Town Court's provider status. Following a hearing, the district court granted the preliminary injunction sought by plaintiffs. The injunction by its terms was to remain in effect pending completion of the HEW reconsideration process, and until five days after the defendants gave plaintiffs written notice of their intention again to terminate Town Court's provider status. After HEW officials notified Town Court that they had affirmed the initial decision to terminate its Medicare provider status, Town Court and the six individually named appellants sought an order extending the preliminary injunction pending an evidentiary hearing and full judicial review. A hearing on this motion was held on September 15, 1977, after which the district court denied plaintiffs' motion to extend those parts of the preliminary injunction that enjoined removal of patients and that enjoined defendants from prohibiting the placement of new patients. We granted an injunction pending appeal that continued in effect those portions of the preliminary injunction that the district court had refused to extend.

Appellants first allege that they will suffer a de facto loss of Medicare benefits without the protection of a prior hearing if they are subjected to the physiological and psychological harm caused by transfer from Town Court. Second, they believe they have a protected property interest in continued occupancy at Town Court so long as Town Court remains in compliance with the applicable statutes and regulations. Consequently, they say that it was an infringement of these interests not to provide an evidentiary hearing and to allow for judicial review prior to decertification of the nursing center and prior to the de facto terminations of their "rights."

In another case decided today we held that

> [b]ecause a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare, Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare.

Klein v. Califano, — F.2d —, — (3d Cir. 1978) (typescript opinion at 13). We believe the holding in *Klein* to be controlling as to the issues raised by these appellants. We therefore remand this cause to the district court for a determination of what procedures will satisfy the constitutional rights of appellants prior to decertification of Town Court Nursing Center and for further proceedings consistent with *Town Court, supra*, and *Klein, supra*.

In No. 77-2444, Secretary of the Department of Health, Education and Welfare Califano has cross-appealed from that portion of the district court order which required that he "not withhold payments [from Town Court Nursing Center] for services actually provided to patients." *Town Court Nursing Center, Inc. v. Beal*, No. 77-2474 (E.D. Pa., Sept. 15, 1977) (order extending preliminary injunction

in part and dissolving preliminary injunction in part). Because Medicaid certification and funding is so inextricably interrelated with federal administrative action through HEW, *see Town Court, supra,* — F.2d at — (opinion at 5-10) and in view of our holding that the residents of the nursing center have a right to a pre-termination hearing, that portion of the order from which Secretary Califano appeals will be affirmed.

The judgment of the district court in appeal No. 77-2222 will be vacated and the cause remanded for further proceedings consistent with *Town Court, supra,* and *Klein, supra.* Costs taxed against appellees.

The judgment of the district court in appeal No. 77-2444 will be affirmed.

Adams, *Circuit Judge,* with whom Gibbons, Weis and Garth, *Circuit Judges,* join, concurring.

In recent years, the government has become increasingly involved in satisfying the medical needs of its citizens, and the Medicare [1] and Medicaid [2] programs form an integral part of this development. They represent congressional enactments for the benefit of the aged and poverty-stricken sick, those on the fringe of society. This legislation has placed the recipient in a dependent position in relationship to government, and created a situation where the recipient expects to receive the privileges which Congress has voted to provide.

[1] 42 U.S.C. §1395 et seq. and implementing regulations.
[2] 42 U.S.C. §1396 et seq. and implementing regulations.

Due process, which secures legitimate property interests from arbitrary government intrusion, protects many of the expectations that flow from such dependent relationship by requiring that government accord affected individuals the process that is due them before it takes a contemplated course of action that may deny such individuals the benefits they anticipate. But the imposition of due process procedures as a predicate to government action can result in reduced efficiency of government operations and the availability of fewer funds for the intended beneficiaries. Concern has been expressed that unless the procedures made available to affected individuals are carefully fashioned their societal cost would outweigh their benefit.[3]

In this case, the full Court is called upon to determine whether patients whose nursing home is about to be decertified as a qualified institution under the Medicare and Medicaid programs have any due process rights, and if so, the extent of such rights. The factual and procedural background of the controversy as well as the relevant statutory and regulatory provisions are set forth in the various opinions in the companion cases, *Town Court Nursing Center, Inc. v. Beal,* No. 77-2221 (3d Cir., Sept. 29, 1978), and *Klein v. Califano,* No. 77-1896 (3d Cir., Sept. 29, 1978). The appeal in this specific proceeding has been brought by six residents of Town Court Nursing Center who contend that their due process and statutory rights would be violated if they are not given an opportunity for a hearing before Medicaid

[3] *E.g.,* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1276 (1975).

funding to the nursing home is terminated. In opposition, HEW and the Pennsylvania Department of Public Welfare maintain that since termination of a facility's eligibility for Medicaid funding does not affect the patient's entitlement to reimbursement for medical care, the patients have not been deprived of any constitutionally protected property right by the decision to terminate.

The opinion announcing the judgment of the Court relies on the decision filed today in *Klein v. Califano*, No. 77-1869 (3d Cir., Sept. 29, 1978), to conclude that the Medicare and Medicaid laws and regulations grant patients a protectible property right to continued residency at the home of their choice absent specific cause for transfer, and that consequently due process requires that they be given an opportunity for a hearing before decertification of their facility. I concur in that determination, but believe it appropriate to set forth some additional thoughts so as to clarify further this position in view of Chief Judge Seitz's dissent.

Moreover, there has been no discussion of the procedures to which the patients are entitled under due process. In *Klein*, the procedural posture in which the issue was presented rendered moot any discussion of precisely what process was constitutionally mandated. Accordingly, the Court in that appeal stated, "We pretermit the issue of how extensive is the process due patients, such as the plaintiffs here, until a case presents us with a continuing live dispute." *Id.* at 18. It seems to me that *Town Court* is such a controversy. Nonetheless, the opinion announcing the judgment of the Court chooses not to

discuss the issue, but rather to "remand this cause to the district court for a determination of what procedures will satisfy the constitutional rights of appellants prior to decertification of Town Court Nursing Center and for further proceedings consistent with *Town Court, supra,* and *Klein, supra.*" Aldisert opinion at 5. Since I believe that in a situation such as this, an appellate court has the obligation to furnish guidance to the district court that may be utilized on remand,[4] this opinion shall also address the problem of what process is due the patients.

I.

An overriding consideration that a court must take into account when it confronts a procedural due process issue is the balance that is to be struck between fairness to the individual and effective government. On the one hand, the concept of due process embodies the law's fundamental respect for the dignity of the individual and its concern to shield him from the arbitrary whims of a government that overwhelms him both in size and power. On the other hand, government could be paralyzed if it were required to afford individuals who will be adversely affected by its decisions lengthy procedural safeguards before it may implement such decisions. The Supreme Court has prudently instructed that these

[4] *See* Geraghty v. United States Parole Commission, Nos. 77-1679 and 77-1858, slip op. at 25 (3d Cir., filed March 9, 1978). Without such guidance there exists the possibility that this Court's energies will be taxed unnecessarily by yet another appeal, and that the trial court may be required to duplicate its effort as well.

competing values be resolved by a two-step analysis.[5] First, it must be ascertained whether the private party has a constitutionally cognizable life, liberty or property right which is threatened by the government action. An open-minded approach towards recognizing such rights enables the law to afford individuals the protection that due process envisions in the multifarious situations in which they are affected by government decisions. Second, the precise protective procedure to which the private party is entitled before he is deprived of his right must be determined. Only at this second step should practical countervailing interests be taken into account to formulate procedures that are responsive to the interests of both the government and the private party. Such methodology, I believe, should control the treatment of the present case.

A.

A survey of the history of due process reveals a steady expansion in protected rights.[6] In large mea-

[5] *See* Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398, 4400, 4401 (U.S., May 1, 1978); Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part); *id.* at 177, 186 (White, J., concurring in part and dissenting in part); *id.* at 207, 212 (Marshall, J., dissenting). For a historical sketch of the development of the two-step analysis, *see* L. Tribe, American Constitutional Law §10-8 at 507-08; §10-10 at 532-33 (1978).

[6] *See e.g.*, Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398 (U.S., May 1, 1978) (public utility service); Mathews v. Eldridge, 424 U.S. 319 (1976) (disability benefits under Social Security Act); Gross v. Lopez, 419 U.S. 565 (1975) (public high school education); Wolff v. McDonnell, 418 U.S. 539 (1974) ("good time" credits towards a shortened jail sentence, and solitary confinement); Perry v. Sinderman, 408 U.S. 593 (1972) (teacher's employment tenure at state university); Morrissey v. Brewer, 408 U.S. 471 (1972) (conditional freedom following parole); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (state welfare benefits). *But see* cases cited in note 8 *infra*.

sure the source of this trend lies in the recognition that the distinction between those rights which a private party can claim against the government and those benefits to which he merely has a government granted privilege is untenable in a society where individuals are becoming ever more dependent on government "privileges" for their very subsistence.[7] The fundamental concept undergirding due process—that an individual not be stripped of his dignity by being

[7] *See e.g.* Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Verner, 374 U.S. 398, 404 (1963). For discussions of the erosion of the right-privilege distinction, see R. O'Neil, The Price of Dependency: Civil Liberties in the Welfare State (1970); Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 Wash. L. Rev. 4 (1964); Powell, *The Right to Work for the State*, 16 Colum. L. Rev. 99 (1916); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1445-49 (1968); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 Duke L.J. 89; Note, *The Effect of Tenure on Public School Teachers' Substantive Constitutional and Procedural Due Process Rights*, 38 Mo. L. Rev. 279, 281-87 (1973); Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A. L. Rev. 1052 (1972).

subject to the arbitrary whims of government—applies with equal force to privileges as to rights. Thus, it is now accepted doctrine that whenever an individual has a "legitimate claim of entitlement" that stems from state or federal law, regulation or practice, he may not be deprived of it without due process.[8]

[8] Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In *Roth* the Supreme Court held that a teacher hired by a state university for a fixed term of one academic year did not possess a constitutionally protected interest in re-employment for the next year. Other cases that have dismissed claims of entitlement on the ground that in fact they merely expressed unilateral expectations that were not recognized by state or federal law include Meachum v. Fano, 427 U.S. 215 (1976) (transfer of prisoner to another state prison); Paul v. Davis, 424 U.S. 693 (1976) (police flyer identifying individual as a "known" shoplifter); Bishop v. Wood, 426 U.S. 341 (1976) (police officer employment). The insistence in these cases that the "legitimate claim of entitlement" be identified only by reference to positive law has been criticized by commentators as manifesting too narrow and rigid a conception of the rights guaranteed by the Constitution and as being internally inconsistent. See L. Tribe, American Constitutional Law §§10-10 & 10-11 (1978); Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405 (1977); Van Alstyne, *Cracks in the "New Property": Adjudicative Due Process in the Administrative State, id.* at 445; Tushnet, *The Newer Property: Suggesting for The Revival of Substantive Due Process, 1975 Supreme Court Review 261;* Comment, *Entitlement, Enjoyment and Due Process of Law,* 1974 Duke L.I. 89; Comment *Two Views of a Prisoner's Right to Due Process: Meachum v. Fano,* Harv. Civ. Rights Civ. Lib. L. Rev. 405 (1977); *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 56, 86-104 (1976). However, in determining whether there is a protected property interest in the situation before us, we are bound by the guidelines enunciated by the Supreme Court.

The majority in *Klein* relies on three aspects of the Medicaid scheme[9] to establish as an initial proposition that a resident of a nursing home has "a legitimate entitlement to continued residency at the home of [his or her] choice absent specific cause for transfer."[10] First, reference is made to those provisions that guarantee that a person eligible for medical assistance under Medicaid may obtain medical services from any institution qualified under the federal program to perform such services.[11] Next, the opinion cites the regulations that ensure notice and a hearing to a recipient "who is aggrieved by an agency action resulting in suspension, reduction, discontinuance or termination of assistance."[12] Finally, the majority invokes the provision which states that a resident may be "transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for

[9] In *Klein,* only termination of Medicaid reimbursements to the nursing home was at issue. In *Town Court,* on the other hand, HEW decertified the facility for Medicaid as well as for Medicare purposes. Nevertheless, *Klein's* treatment of the Medicaid provisions is equally apposite to the Medicare aspect of the *Town Court* litigation since at least two of the provisions of the Medicaid program that were relied upon in *Klein* have their counterparts in the Medicare statute and regulations. *See* notes 11-13 *infra.*

[10] Opinion at 12.

[11] 42 U.S.C. §1396a(a)(23); 45 C.F.R. §249.20 (1976). The parallel provision in the Medicare scheme is 42 U.S.C. §1395a.

[12] 45 C.F.R. §205.10(a)(5); *id.* §(4)(i). The Medicare scheme guarantees similar procedural protections. 20 C.F.R. §404 901 et seq. (1976); *see id.* at §405.701.

his stay."[13] After inferring a property right from these clauses, the Court in *Klein* posits that "a decision to decertify a nursing home as an unqualified provider is tantamount to an order to transfer a patient for his welfare,"[14] and consequently concludes that "Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare."[15]

In his dissent in this case, Chief Judge Seitz takes issue with the *Klein* majority regarding its premises and its conclusion. He finds unpersuasive any inference from the Medicaid plan of a property right that nursing home residents may assert in opposition to decertification of such facility. He notes that the first provision cited by the majority guarantees only that a recipient have the right to choose among *qualified* institutions; that the second provision ensures notice and a hearing only before termination or reduction in benefits, not before transfer from an unqualified facility; and that the third provision imposes upon the medical facility a standard of conduct with regard to transfer and discharge of individual residents and does not create any rights in the residents vis-a-vis HEW.[16]

This attempt by the dissent carefully to delimit the scope of the property right created by the three provisions, I believe, misses the thrust of the regulations

[13] 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976).

[14] Opinion at 13.

[15] *Id.* (footnote omitted).

[16] Opinion at 29.

and tends to trivialize the majority's approach in inferring a basis for the right to due process. Surely the majority does not intend to ground the property rights of the residents of Town Court on the regulation that requires notice and a hearing for the recipient prior to termination or discontinuance of Medicaid benefits. Similarly, the majority undoubtedly acknowledges that the provision that places limitations upon transfer or discharge is addressed only to the facility, not to HEW. However, when conjoined with the grant of freedom to choose among any qualified institutions, these regulations paint three distinct points in the landscape of a "legitimate claim of entitlement" that Medicaid beneficiaries can assert. Taken alone, the interest created by each of these clauses might be dismissed as not rising to the level of a cognizable property interest. However, when viewed together, they compel the conclusion that they identify three aspects of an "underlying substantive interest"[17] that enjoys the stature of "property."

What are the identifiable contours of this property right? First, it is evident that every Medicaid recipient has a protected right to uninterrupted receipt of benefits under the program. He or she may not be deprived of these payments without prior notice and an evidentiary hearing. Second, the regulations allow an elderly, infirm individual who seeks nursing home treatment freedom of choice in selecting the home of his or her preference so long as that home has qualified under the Medicaid program. Once confined

[17] Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398, 4400 (U.S., May 1, 1978).

in the home, the resident has a right to remain there, and may be moved only under specific circumstances. The facility itself may transfer or discharge a resident "only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay."[18] The regulations do not explicitly specify any circumstances under which HEW may cause the removal of a resident from his chosen facility. However, at least two such situations are inherent in the regulatory scheme. HEW may instigate a resident's removal by terminating his benefits. Also, HEW may precipitate a resident's transfer to another home by decertifying the facility at which he presently resides, inasmuch as the regulation ensures only the freedom to choose among qualified institutions. This last aspect of the property right is implicated in *Klein* and *Town Court*.

The Supreme Court has repeatedly stated that "some kind of hearing is required at some time before a person is finally deprived of his property interest." *Memphis Light, Gas & Water Division v. Craft*, 46 U.S.L.W. 4398, 4402 (U.S. May 1, 1978), *quoting Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). *See also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Inasmuch as the regulatory scheme invests each resident with a right to remain at the facility of his choosing so long as it qualifies under the plan, the decision to decertify the institution necessarily effects a deprivation of this right and entitles the resident to due process procedures.[19]

[18] 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976).

[19] This conclusion is buttressed by the fact that the regulations already provide the patients with procedural safeguards in the two other situations where their removal from the facility of their choice is authorized, namely, when the facility seeks to transfer them, *see* note 13 and accompanying text *supra*, and when HEW terminates thier benefits, *see* note 12 and accompanying text *supra*.

I agree with the dissent—as must my other colleagues—that nursing home residents have no right to choose or to remain in a non-qualified facility. But that begs the question, at least in the instant case. For this limitation on the residents' property right perforce has no bearing on the issue whether residents of a *presently qualified* facility—as were the Town Court residents at the time in question—must be given the opportunity to participate in deliberations that may lead to the facility's decertification. The continued existence of the residents' constitutionally protected property right to remain in the home of their choice hinges on whether the facility is qualified. And the residents here are seeking to present information touching on that issue. Consequently, due process mandates that before they are deprived of their right, the affected individuals be afforded the opportunity to be heard on the material factual issue of the home's qualification.[20]

[20] This analysis rests solely on the limited property right established by the first provision cited by the *Klein* majority, 42 U.S.C. §1396a(a)(23); 45 C.F.R. §249.20 (1976). The other two provisions referred to in *Klein* merely shed light on Congress's intent to create a property interest in favor of nursing home residents to remain in the qualified home of their choice.

Accordingly, the interpretation proffered herein does not necessitate making the assertion—made by the *Klein* majority—that decertification of a facility is tantamount to a decision to transfer an individual resident. Nevertheless, the

In addition to disputing the existence of a property right, the dissent makes a number of arguments to support its contention that there is nothing "harsh or unrealistic about the scope of present statutory and administrative procedures governing decertification."[21] First, the dissent attempts to distinguish the Town Court situation from the circumstances presented in the Supreme Court cases employed by the majority[22] on the ground that decertification of an institution does not terminate or otherwise prejudice the rights

analysis here suggests the fallacy in the dissent's refutation of the majority's assertion. The dissent concedes that the practical effect of decertification in most cases is the forced transfer of residents, but maintains that an analytical distinction exists because decertification focuses on the facility's substantial noncompliance with HEW standards. Since residents have no right to remain in an unqualified institution, the dissent reasons " 'transfer trauma' . . . is subordinate to the threat posed to all residents by substandard conditions." Opinion at 30. As pointed out in the text, however, the dissent assumes as a premise the factual issue which the residents seek to contest, namely, whether the institution is unqualified within the meaning of the statute.

Obviously, inasmuch as the holding that residents of a nursing home who receive benefits under the Medicare or Medicaid programs are entitled to due process procedures before the home is decertified rests on this Court's construction of the governing regulations, the decision is limited to such patients. The rights of other patients—such as those hospitalized for mental illness or retardation in state institutions—is dependent upon the language and intent of the provisions controlling their confinement.

[21] Opinion at 30.

[22] Memphis Light, Gas and Water Division v. Craft, 46 U.S.L.W. 4398 (U.S., May 1, 1978); Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1974).

of the residents to receive Medicaid benefits so long as they live in another, qualified facility. This distinction appears to be beside the point. Just as the right to Medicaid benefits is cognizable under due process, so too is the right to remain at the qualified facility of one's choice, and *this* right *has* been prejudiced by decertification of the facility.

Second, the dissent points out that since the institution has a vested interest in preserving its status under the Medicaid plan, it can be expected to adduce the best case for continued certification. And, the dissent continues, the institution is in the position to correct deficiencies and thus avoid termination. While these observations appear to be correct, they cannot obviate the need under due process to afford residents the opportunity to present *their* perceptions and perspectives on the issue of decertification. It seems to me to be a proposition fraught with danger—and indeed incorrect as a matter of due process analysis—to curtail the legitimate property rights of the residents simply because the residents are funded indirectly through payments to the nursing home, thus creating a property right in the institution as well. Rather, due process protections must be accorded equally to the "legitimate claims of entitlement" of the residents and to the institution.

Third, the dissent suggests that the administrative procedures currently in existence adequately protect the interests of the residents. Chief Judge Seitz specifically takes judicial notice of a Pennsylvania Department of Health manual[23] which states that the

[23] Pennsylvania Department of Health, Long Term Care Facilities Surveyor's Orientation Manual (September 1976).

required on-site predecertification survey "generally involves" interviews with residents,[24] and notes that the survey team consists of highly trained professionals. He also remarks that senile and incompetent residents would often be unable to participate in a due process hearing. Finally, the dissent raises the specter of administrative and judicial delays if residents are afforded participation rights "in all surveys and, presumably, in judicial review of their sufficiency."[25] Since these contentions appear logically to be directed to the *type* of due process procedure to which the residents are entitled, they are best treated in that context.

In sum, the Medicare and Medicaid programs appear to establish a "legitimate claim of entitlement" which must be accorded due process protection. However, even if a court were to conclude that the governing provisions do not on their face create such a property right, it would be required to construe them in a manner that fairly accords with the circumstances of the parties and with the underlying purpose of the due process clause. I believe that the result reached by a majority of this Court comports with that mandate. It would be difficult to contend that nursing home patients do not have a strong interest in avoiding unnecessary transfers. Many of them have been uprooted from the communities in which they spent their working lives. For most of these patients, the limited world of the nursing home is the only community in which they retain a stable network of personal and social relationships. In addition, invalids

[24] *Id.* at III 8-9.

[25] Opinion at 32.

and prospective invalids alike have a strong interest in avoiding the unnecessary physical hardship that could result from a mistaken transfer. These "home" and "health" interests, I submit, are among those that most persons would regard as being encompassed by the protections of the due process clause.

Also, we may take judicial notice of the fact that the plaintiff patients in these cases are physically weakened, economically disadvantaged, and often without significant contact with or control over the "outside community." Economic need and physical incapacity appear to have forced them to seek support from the government. They thus are members of a class of persons to whom the enforcement of essential procedural protections through a non-majoritarian branch of the government is of special importance.[26] For us to construe the controlling provisions strictly against the patients in such circumstances would seem to violate elementary notions of fairness.

These practical factors, to my mind, are relevant and persuasive on the issue of whether the statute and regulations should be interpreted to create a protected property interest in this case. The majority's reading of the statute fairly conforms to these underlying equitable concerns. Even if the dissent's strict construction were textually plausible, it is inconsistent with this more elemental understanding of the problem.

The kind of issue raised in this case is one that this Court will doubtless face again. Federal transfer pay-

[26] See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

ments, which are an enormous factor in total economic activity, have resulted in all sorts of new quasi-contractual relationships. They have thereby transformed, for millions of persons, the very nature of property. An occupant of a nursing home, for example, will in many cases have no property interest in this world other than the expectation of occupying a familiar room and seeing familiar faces. Because that expectation does not fit into a conventional legal pigeonhole like a leasehold for a term or a tenure of employment, many judges may be uncomfortable with the thought of affording it appropriate due process protection. But there is, it seems to me, more rather than less need for the recognition of minimum due process protections for the new forms of property which arise out of the increasing role of government in transfers of the fruits of the economy. We should be alert for and receptive to claims for due process protection of those new forms of property, and where the terms of the authorizing rules permit, we should be prepared to take a practical rather than a technical approach to such claims, whenever it is necessary to protect the dignity and autonomy of those who participate in wealth transfer programs.

B.

Once it is determined that the government is constrained from taking a particular action affecting private parties without according them due process of law, it is essential to ascertain what process is due. The principle that governs this second phase of the due process inquiry is to be contrasted with the inclusive approach towards identifying the rights that are entitled to due process protection. As the Supreme Court has instructed, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands". *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), *quoting Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).[27] Thus, practical considerations play a prominent role in fashioning the procedural safeguards that will implement the fundamental due process concern of preventing officals from arbitrarily interfering with private endeavors. The practical considerations reflect the recognition that the government must be able to function efficiently and expeditiously and that if scarce public resources are to be used optimally, the government cannot be unduly fettered in administering its programs by costly and time consuming bureaucratic procedures.[28] Therefore, in assessing what procedural safeguards are necessary before government may deprive a private party of a constitutionally protected interest, courts should be careful to require only the minimal protections mandated by due process, leaving the other branches of government free to determine the extent of the procedural protective mechanisms that will be authorized.[29] The constitutionality of a chosen scheme should be upheld if it permits the aggrieved party to air his views in such a manner that the risk of an erroneous determination by the government is reduced and the value of other, more burdensome procedures

[27] *See also* Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugees Comm. v. McGrath, 341 U.S. 123, 162-63 (Frankfurter, J., concurring).

[28] *See* Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976).

[29] *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

is outweighed by the cost and delay that they would entail.

This flexible framework for analyzing what procedural safeguards are mandated by due process has been clearly articulated in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

> [R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy, supra,* at 167-168 (Powell, J., concurring in part); *Goldberg v. Kelly,* at 263-266; *Cafeteria Workers v. McElroy,* at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g., Goldberg v. Kelly, supra,* at 263-271.

When balancing the governmental and private interests to arrive at the process that is due, only once has the Supreme Court insisted on a full evidentiary hearing before the government decision in question

became effective.[30] The Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970), held unconstitutional a procedure which provided for written submissions by the welfare recipient but no hearing before payments were cut off. In requiring that the welfare recipient be afforded a pre-termination full evidentiary hearing at which he can appear personally, offer oral evidence and confront witnesses, *Goldberg* recognized that

> "the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desparate. This need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."

Id. at 264. (emphasis in original). The Court concluded that "the interest of the eligible recipient in uninterrupted receipt of public assistance coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the state's competing concern to prevent any increase in its fiscal and administrative burdens." *Id.* at 266.

In other cases before the Supreme Court, due process has been found to be satisfied by administrative procedures that did not include a full evidentiary hearing before the deprivation. Thus, where a private party sought to garnish property, the Court held that due process requirements were met if the garnish-

[30] *See* Mathews v. Eldridge, 424 U.S. 319, 340 (1976).

ing party was required to initiate an *ex parte* proceeding before a neutral officer, supply an affidavit supporting the claim to the property, and post a bond, provided that the aggrieved party is given an opportunity to contest the seizure promptly thereafter. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Also, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court upheld the administrative procedures for dismissing a federal employee for cause, which included a copy of the charge and an opportunity to file a written response and to make an oral appearance before the dismissal, with an evidentiary proceeding only thereafter. Just last term the Supreme Court found that an informal administrative remedy whereby a customer whose municipal utility service was to be cut off for nonpayment of bills would be permitted to meet with "a responsible employee empowered to resolve the dispute" was sufficient to satisfy the dictates of due process. *Memphis Light, Gas and Water Division v. Craft*, 46 U.S.L.W. 4398, 4403 (U.S., May 1, 1978).

Of the recent Supreme Court pronouncements regarding the process that is due in various situations, *Mathews v. Eldridge*[31] is most instructive for determining what protections must be accorded the patients in the instant case. In *Eldridge* the Supreme Court was faced with whether due process required that a recipient of Social Security disability payments be afforded an opportunity for an evidentiary hearing before his benefits were terminated. After carefully

[31] 424 U.S. 319 (1976).

balancing the private[32] and public[33] interests as they were manifested in the situation before it and evaluating the fairness and reliability of the existing pretermination procedures,[34] the Court found that the elaborate administrative mechanism provided by the Social Security Administration[35] satisfied the

[32] The Court determined that since the recipient is entitled to retroactive benefits if he ultimately prevails, his only interest is in the uninterrupted receipt of funds pending final disposition of his claim. 424 U.S. at 340.

[33] The Court mentioned "the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision," and noted the strong interest of the public "in conserving scarce fiscal and administrative resources", particularly since "the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving . . ." 424 U.S. at 347-48.

[34] The Court focused on the fact that in most cases the validity of the disability claim hinges on the evaluation of easily documented routine and unbiased medical reports, and concluded that since credibility is rarely an issue the reports could be assessed upon written submissions, as provided in the existing procedures. This was found to create a decided distinction between *Eldridge* and *Goldberg v. Kelly, supra*, in that oral presentation was deemed to be essential for a welfare recipient to communicate his case to the decision-maker in view of the low educational level of most recipients. 424 U.S. at 343-45.

[35] Among other procedural safeguards, the administrative mechanism required the state agency which administered the program to evaluate periodically the recipient's continued eligibility. Its assessments were to be based on investigations performed by its own medical and nonmedical personnel as well as upon information which it solicited from those who treated the recipient and from a detailed

mandate of due process, and that a full evidentiary hearing was not required. Noteworthy is the admonition with which the Court concluded its opinion:

> [T]he judicial model of an evidentiary hearing is neither a required, nor even the most effective method of decisionmaking in all circumstances. . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S. at 268-269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair considera-

questionnaire from the recipient himself. Upon reaching a tentative conclusion that benefits should be terminated, the agency was required to provide the recipient with a summary of the evidence upon which it based its assessment, to afford him an opportunity to review his file, and to permit him to respond in writing and submit additional evidence. After the state agency made its final determination, it was to be reviewed by an examiner in the Social Security Administration Bureau of Disability Insurance and accepted by the Administration. Benefits were to be terminated two months after the month in which medical recovery is found to have occurred. The recipient is given the right to have the termination reviewed by different levels in the state agency, the Administration, and finally, the federal courts. If he prevails to any degree the recipient is entitled to retroactive payments. 424 U.S. at 336-39.

> tion of the entitlement claims of individuals. See *Arnett v. Kennedy*, 416 U.S., at 202 (White, J., concurring in part and dissenting in part).

424 U.S. at 348-49.

It is evident, in view of *Eldridge*, that the Town Court residents need not be afforded an evidentiary hearing before the decision to decertify the facility becomes final. *Eldridge* emphasized that the critical element that underlay *Goldberg's* requirement of a pre-termination evidentiary hearing was that without welfare benefits the recipient was left destitute, and would in all likelihood be unable to pursue his administrative remedies. This factor was found lacking in *Eldridge*,[36] and is also absent from the situation in Town Court, where the patients will continue to receive Medicaid assistance after their transfer to other facilities. Consequently, no justification would seem to exist here for departing from the general rule that due process is satisfied by "something less than an evidentiary hearing,"[37] as long as the selected procedures "assure fair consideration of the entitlement claims of individuals."[38]

In determining what process is due the Town Court residents, it is helpful to place in perspective the purpose that will be served by such procedures. Obviously, the facility's residents cannot be expected to play a primary role in the decision to decertify. As the dissent points out, the main burden for presenting the case in support of continued certification must

[36] 424 U.S. at 340-43.

[37] Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

[38] *Id.* at 349.

rest with the institution itself, since it has the greatest financial interest at stake and is in the better position to adduce relevant facts and to correct violations. Still, the facility's residents have a two-fold, unique interest that should be accommodated by the due process-mandated procedures.

First, the residents have a legitimate claim that they be permitted to supplement any data gathered from other investigative sources regarding the issue whether the facility qualifies under federal and state standards. On the basis of their first-hand experiences the residents can provide relevant information—which cannot be obtained from other sources—concerning the daily functioning of the institution as it affects them.[39]

Second, the residents should be allowed to bring to light other factors that ought to be weighed before a facility is decertified and its Medicare and Medicaid patients moved elsewhere. The distinction between

[39] As the lower court in *Klein* aptly commented,

> While the court is deferential to the expertise of HEW, it is rank paternalism to suggest that patients who live in a facility, who have firsthand knowledge of the conditions, who are best equipped to describe how that facility has served them, cannot contribute to the process by which it is determined whether the facility meets federal standards. The court finds it hard to understand how HEW can seriously argue that the very patients whom HEW seeks to protect can have no purposeful role with respect to the condition of their environment.

Klein v. Mathews, 430 F. Supp. 1005 (D.N.J., 1977), *remanded with instructions to dismiss as moot*, No. 77-1896 (3d Cir., Sept. 29, 1978).

qualified and unqualified homes is not marked by a bright line. Rather, an institution is decertified when, in the judgment of the federal and state administrators charged with reviewing its performance, it is not in "substantial compliance" with applicable standards and is unlikely to correct its violations.[40] As the Town Court proceedings indicate, a facility may technically be in noncompliance with the standards for a period of years before it is finally decertified.[41] In view of the discretionary nature of a decision to decertify an institution, it seems reasonable to conclude that where the patient transfer that inevitably accompanies decertification would result in serious hardship or danger to the patients, the administrators probably would be reluctant to decertify the institution and would seek instead to alleviate the nonconforming conditions through alternative sanctions. For instance, if it were brought to the administrators' attention that ten patients were in an intensive care unit recovering from recent heart attacks and that moving them would endanger their lives, the decisionmakers might decide to maintain the institution's certification on a temporary basis. The residents are entitled to an opportunity to present factors such as these which affect their right to remain at the qualified institution of their choice.

[40] 42 U.S.C. §1395cc(b)(2).

[41] Thus, despite various deficiencies, Town Court was able to maintain its status as a qualified facility from the time of its certification in 1967 until October, 1974, because it was still in "substantial compliance" and because it continually submitted plans of correction. Town Court Nursing Center, Inc. v. Beal, No. 77-2221, opinion at 10 (3d Cir., Sept. 29, 1978).

Besides the usual interests in reducing administrative burdens and other social costs, the government's interests in many ways complement those of the patients. Of prime concern to the government is the patients' well-being.[42] To this end the statutory scheme requires periodic inspections and evaluations of the facility.[43] Also, the patients' welfare necessitates expeditious action to close down facilities with dangerous conditions.

With this assessment of the interests of the patients and the government, the precise process that is due residents of an institution prior to decertification may now be outlined. The interests of the patients and the government can optimally be served by informal and flexibly-structured procedures whose purpose would be to permit the patients to provide relevant information on a decision that will have a major effect on their lives before that decision is made, while not unduly delaying or complicating the administrative process.

Since the patients are clustered at the facility and the information sought is within their knowledge, their participation could be solicited upon short notice. In fact, the procedure by which data is obtained from them could easily be incorporated into the present apparatus for investigating and surveying the institution.[44] As part of the numerous surveys that are conducted at the institution prior to decertification, the government representatives should therefore assemble the residents of the facility for an informal opportunity to express their views. At such occasion the government representative should explain the contemplated action, the reasons for it, and its potential effect on the patients. Then the patients should be asked to comment. This gathering should be supplemented with individual interviews with those patients who did not attend, since the reasons which prevented them from attending may also justify a determination that they should not be transferred. To ensure the greatest degree of input and to accommodate the needs of the various residents, they should be given the opportunity to present material both orally and in writing, and be offered assistance in formulating their responses.[45]

[42] *Cf.* 45 C.F.R. §249.12(a)(1)(ii)(B)(4) (1976) (regulation permits facility to transfer patients only, *inter alia*, "for his welfare or that of other patients.").

[43] 45 C.F.R. §250.23 (1976). The statute limits accreditation of a facility to twelve months, 42 U.S.C. §1395cc(a)(1), thus necessitating annual surveys.

[44] 45 C.F.R. §250.23(a)(3)(v) (1976) specifically requires that the medical review team inspection include "personal contact with and observation of each patient receiving assistance under the plan by a team member or members, and review of each such patient's medical record." *See also* text accompanying note 23 *supra* (dissent takes judicial notice of Pennsylvania manual stating that on-site survey "generally involves" interviews with residents).

[45] Allowing the patients this flexibility in choosing among alternative modes of communication appears to be mandated in light of the Supreme Court's discussion in Mathews v. Eldridge, *see* note 34 *supra*. Many of the elderly patients who reside in nursing homes may share with the welfare claimant in Goldberg v. Kelly the inability to communicate effectively in writing. Others may feel intimidated or embarrassed by their fellow residents' presence at the gathering and prefer not to disclose personal concerns. Still others may be both unable to communicate in writing and unwilling to

The fact that many residents are physically or mentally too infirm to take advantage of any procedural machinery that would be established is an inadequate reason for not setting up a mechanism that will meaningfully represent their constitutionally-protected interests. If a patient is too sick to participate, he may be too sick to be transferred, and the investigators should be required to look into that possibility. Also, the needs of these unfortunate individuals can be presented by relatives, friends, or other representatives, who should be notified of such opportunity.

Carefully circumscribed procedures—as previously suggested—for protecting the rights of nursing home residents who receive benefits under the Medicaid program in remaining at the qualified institution of their choice, at least until it has been determined to be unqualified, would appear appropriate. The limited participation afforded by such an arrangement would not unduly impede the government's ability to take decisive and prompt action to ensure the welfare of the patients. It would not constrict the freedom of the other branches of the government by requiring the establishment of bureaucratic machinery or necessitating costly expenditures.

Moreover, it would not be required at the annual survey of the facility but only in the infrequent event that decertification of the facility is proposed, since only in that event do the regulations invest the residents with a protectible property right. Finally, it would not clog the courts, because patients who are

speak in public, but would be willing to discuss their concerns in private interviews.

transferred to a different facility as a result of a procedurally fair determination to decertify the institution at which they resided rarely will have any reason to question the administrative decision in a post-decertification court battle. Nevertheless, granting the patients this limited opportunity to air their concerns sufficiently reduces the risk of an erroneous deprivation of the rights of those who potentially are affected most seriously by the decision to constitute the process that is due them.

CONCLUSION

As often occurs in cases involving constitutional issues, the factual situation presented in Town Court may not be a particularly appealing one for expounding constitutional protections. The nursing home has a history of noncompliance with the governing regulations. It has been subject to a number of extensive investigations and had been afforded opportunities to correct deficiencies before it was finally decertified. Nonetheless, when a court is adjudicating constitutional principles, its view should not be obscured by the fact that one or the other litigant does not measure up to a particular standard. Although the government's decertification decision may eventually be proven to be correct, that is not the point at issue in the patient's appeal. Rather, we have been asked to address the limited questions whether the governing regulations secure the right to residents of a facility presently qualified under Medicare and Medicaid to be heard before the facility is decertified, and if so,

the extent of this right. I believe that in recognizing in the patients a right to participate while carefully limiting its content, an approach has been suggested that both enhances the values of due process and is practical in its application.

SEITZ, *Chief Judge*, dissenting.

Judge Aldisert's opinion relies on the majority opinion filed today in *Klein v. Califano*, No. 77-1896 (September 29, 1978, 3d Cir.). In this dissent, therefore, I primarily address the reasoning in *Klein*, with some reference to the concurring opinion herein.

Klein holds that due process requires that residents of an intermediate health care facility be given an opportunity for a hearing before decertification of that facility. Initially, the *Klein* majority postulates that HEW's regulations grant residents a "property right" not to be transferred without cause. As its minor premise, the majority asserts that an initial administrative decision to decertify an institution is tantamount to an order to transfer. We are to deduce, then, that Medicaid residents are constitutionally entitled to an opportunity to participate in the proceedings that may lead to an initial decertification. I cannot agree either with the majority's premises or with its conclusion.

The majority recognizes, as it must, that due process would place procedural constraints on HEW only if the residents' interests in continued occupancy enjoy the stature of "property." An independent source, here the Medicaid law and regulations, must create

the "underlying substantive interest" that is to be accorded this stature; federal constitutional law then determines whether that interest "rises to the level of a 'legitimate claim of entitlement' protected by due process." *Memphis Light, Gas & Water Division v. Craft*, — U.S. —, —, 98 S.Ct. 1554, 1560 (1978).

The majority finds that continued residency in the nursing home of one's choice absent specific cause for transfer is an underlying substantive interest created by three Medicaid provisions. Under the first, 42 U.S.C. §1396a(a)(23), a Medicaid recipient may obtain medical care "from any institution . . . qualified to provide service or services required." Clearly, what the majority characterizes as a recipient's right to obtain medical care from a "freely selected provider" is limited to a choice among institutions which have been determined by the Secretary to be "qualified." Next, the majority's reliance on 45 C.F.R. §205.10(a)(5), ensuring a notice and hearing to a recipient whose benefits are suspended, reduced, discontinued or terminated, is obviously misplaced. As the majority itself notes, the decertification of these facilities did not reduce or suspend the residents' rights to continued benefits.

Finally, the majority relies upon 45 C.F.R. §249.12(a)(1)(ii)(B)(4),[1] which establishes as one requirement for an institution's certification that each resident admitted to that institution be "transferred or discharged only for medical reasons or for his wel-

[1] 45 C.F.R. §249 (1976) has been recodified at 42 C.F.R. §449 (1977). In conformity with the majority opinion all citations to that section will be to the earlier codification.

fare or that of other patients, or for nonpayment for his stay." The majority reads this provision as a limitation on the Secretary's power to interrupt a recipient's residence at a particular institution. Clearly, however, this provision is a standard of conduct imposed by the Secretary upon the provider. Violation of this standard is one of many grounds for decertifying the offending institution. *See* 45 C.F.R. §§249.33 (a) (2), 249.10(b) (15). The provision creates no "substantive interest" in the residents vis-a-vis the Secretary.

Moving to its minor premise, the majority postulates that a decision to decertify is tantamount to a decision to transfer individual residents. Practically, of course, this may be a consequence in most cases, at least where an institution fails to remedy its insufficiencies. Analytically, however, the two decisions are different. Decertification focuses on the institution's noncompliance with HEW's standards. The majority does not and cannot contend that recipients have a right to remain in an institution that the Secretary has found, by appropriate procedures, to be in substantial noncompliance with the standards. "Transfer trauma," although a legitimate concern for some residents, is necessarily subordinate to the threat posed to all residents by substandard conditions.

Thus, a careful reading of the provisions cited by the majority reveals that neither statutes nor regulations grant the residents of an intermediate health care facility a "substantive interest" in decertification proceedings brought by the Secretary; hence, the residents have no constitutionally protected property right in uninterrupted occupancy.

The concurring opinion in this case concedes that "[t]aken alone, the interest created by each of [these provisions] might be dismissed as not rising to the level of a cognizable property interest." Nonetheless, we are asked to agglomerate these "three distinct points" into a "landscape of a 'legitimate claim of entitlement.'" Each of the provisions governs an isolated and inapposite aspect of the program's administration. Their effect as a whole, then, cannot be greater than the sum of their parts. Nor is such infirmity rehabilitated by expressions of concern, in which I join, for the welfare of patients generally.

There is nothing harsh or unrealistic about the scope of present statutory and administrative procedures governing decertification. Significantly, a decertification of a non-complying facility does not terminate or otherwise prejudice the rights of the residents to continued Medicaid benefits. Their benefits will be paid so long as they reside in an intermediate health care facility that complies with federal standards. This important fact immediately distinguishes the cases, employed by the majority in *Klein*, in which the individual involved suffered possible direct prejudice to some substantive liberty or property interest.[2]

Furthermore, and of substantial significance, there is resident input in the survey that must precede an initial decertification. We may take judicial notice of a document entitled "Long Term Care Facilities Sur-

---

[3] *Memphis Light, Gas & Water Division v. Craft*, U.S. , 98 S.Ct. 1554 (1978); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

veyor's Orientation Manual" published in September 1976 by the Pennsylvania Department of Health. On pages III 8-9 of the Manual, in a section entitled "Survey Methodology," the Manual notes that an on-site survey "generally involves" interviews with residents. On page III-7 the Manual suggests that the surveyor at times may have to assume the role of "patient advocate."

A nursing home is not even initially terminated until elaborate proceedings conducted by professionals have resulted in a determination that the institution is not complying substantially with the provisions of its agreement with the Secretary. Here, the survey team consisted of two registered nurses, a dietician, and an equal opportunity development specialist. *See Town Court v. Beal*, No. 77-2221 (filed September 29, 1978, 3d Cir.).

While the Medicaid program itself has been enacted for the benefit of the residents, the survey proceedings are necessarily concerned with the applicable conditions of participation as set forth in the regulations. One should not lose sight of the fact, however, that the ongoing monitoring of participating health care facilities is primarily designed to protect the health and safety of the residents.

In many cases residents would not be in physical or medical condition to participate even minimally in a decertification hearing. Indeed, it is not clear what duties the majority in *Klein* would impose upon the Secretary where senile or incompetent residents are incapable of representing their own interests. Furthermore, since all such facilities must be surveyed

annually, it is evident that the majority's position would require that residents be afforded "due process" rights in all surveys and, presumably, in judicial review of their sufficiency.

The provider, of course, has a vested interest in "defending" his institution during any survey and so may be expected to adduce the best case for continued certification. Furthermore, he is the one who can correct deficiencies and thus avoid a termination.

Both the law and the facts dictate the conclusion that the mandated initial termination procedures do not deprive these residents of due process.

I would affirm the order of the district court refusing to extend portions of the preliminary injunction (No. 77-2222) and I would reverse the order of the district court continuing in effect part of the preliminary injunction (No. 77-2444).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 77-2222 and 77-2444

TOWN COURT NURSING CENTER, INC.

and

COOPER, EMMA, CRAWFORD, MARY, KEMP, HAZEL, PHILLIPS, ARNOLD L., TADDEI, DELPHINE, TRUITT, NANCY, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.

v.

BEAL, FRANK S., individually and in his capacity as Secretary of Public Welfare of the Commonwealth of Pennsylvania,

and

CALIFANO, JOSEPH A., JR., individually and in his capacity as Secretary of the United States Department of Health, Education, and Welfare.

EMMA COOPER, MARY CRAWFORD, HAZEL KEMP, ARNOLD L. PHILLIPS, DELPHINE TADDEI, and NANCY TRUITT, individually and on behalf of the class of patients eligible for Pennsylvania Medical Assistance Program benefits at Town Court Nursing Center, Inc.,

Appellants in
No. 77-2222,

JOSEPH A. CALIFANO, JR., Secretary of the United States Department of Health, Education and Welfare,

Appellant in
No. 77-2444.

Before: Seitz, *Chief Judge*, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, and Higginbotham,

Circuit Judges

ORDER AMENDING OPINION

It Is Ordered that the printed slip opinion filed September 29, 1978 be amended as follows:

The following paragraph is added on page 32 at the end of the dissenting opinion:

Judge Rosenn and Judge Hunter join this dissent.

Collins J. Seitz
Chief Judge

Dated: October 13, 1978.

SUPREME COURT OF THE UNITED STATES

No. A-555

FRANK BEAL, SECRETARY OF PUBLIC WELFARE, ET AL.,

Petitioners,

v.

TOWN COURT NURSING CENTER, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s).

It Is Ordered that the time for filing a petition for writ of certiorai in the above-entitled cause be, and the same is hereby, extended to and including February 7, 1979.

(s) Wm. J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 18 day of December, 1978.

SUPREME COURT OF THE UNITED STATES

No. A-555

FRANK BEAL, SECRETARY OF PUBLIC WELFARE,

Petitioner,

v.

TOWN COURT NURSING CENTER, INC., ET AL.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s).

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including February 26, 1979.

(s) William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 25 day of January, 1979.